Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term, 1995

James R. Dunworth,
Petitioner,

v.

Office of Personnel Management,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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26 June 1996

QUESTIONS PRESENTED

1. Is due process denied by the manner in which the Federal personnel appeal system is operated and administered by the Office of Personnel Management, the Merit Systems Protection Board, and the U.S. Court of Appeals for the Federal Circuit?

2. Is the meaning of the word "bonus" as that word is used in 5 U.S.C. § 8331 (3) unique to that statute, or should the word be given its ordinary meaning under the law when interpreting §8331(3)?

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v.
Office of Personnel Management,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, James Richard Dunworth, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above captioned proceeding on 8 March 1996 and issued as an order on 17 April 1996 after denial of rehearing.

OPINIONS BELOW

The unreported opinion of the Court of Appeals for the Federal Circuit is reprinted in the appendix at

page 1a, and the court's order denying rehearing is reprinted at page 11a.

The initial decision of the Merit Systems Protection Board is reprinted in the appendix at page 3a. The denial of the petition for review is reprinted at 12a.

The initial decision of the Office of Personnel Management is reprinted in the appendix at page 15a, and the decision after request for reconsideration is reprinted at 17a.

JURISDICTION

Under provisions of 5 U.S.C. §8301 et seq., and its accompanying regulations at 5 CFR §831.109, et seq., petitioner requested the assistance of the Office of Personnel Management (OPM). The 10 January 1995 decision of the agency was appealed to the Merit Systems Protection Board (MSPB) under the same authority.

28 USC §1295(9) provided jurisdiction for petitioner's appeal from the 5 June 1995 decision of the MSPB to the U. S. Court of Appeals for the Federal Circuit.

Jurisdiction for review of the Federal Circuit's 8 March 1996 decision (rehearing denied 17 April) is provided by 28 USC §1254.

STATUTORY & REGULATORY PROVISIONS INVOLVED

Title 5, United States Code, Section 8331(3):

> (3) "basic pay" . . . does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay fixed by law or regulation except as provided by subparagraph (B), (C), and (D) of this paragraph, retroactive pay under section 5344 of this title in the case of a retired or deceased employee, uniform allowance under section 5901 of this title, or lump - sum leave payments under subchapter VI of chapter 55 of this title. For an employee paid on a fee basis, the maximum amount of basic pay which may be used is $10,000.

Title 5, United States Code, Section 8114 (e):

> The value of subsistence and quarters and any other form of remuneration in kind for services if its value can be estimated in money, and premium pay under section 5545 (c) (1) of this title are included as part of the pay, but account is not taken of——
>
> (1) overtime pay,

(2) additional pay or allowances authorized outside the United States because of differential in cost of living or other special circumstances; or

(3) bonus or premium pay for extraordinary service including bonus pay for particularly hazardous service in time of war.

Title 29, Code of Federal Regulations,
Section 778.211(b):

(b) *Discretionary character of excluded bonuses.* In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e) (3) (a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular

> rate under section 7(e) (3) (a). Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, in his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.

Panama Area Wage Board Pay Administration Issuance 550, §1a.

> The regulations contained in this issuance cover pay administration for employees in the Non-Manual, Manual, and Special Categories . . . .

Pay Administration Issuance 550, §3a.

> Basic compensation . . . is exclusive of such additional compensation as overtime pay or

annual premium compensation and extra pay for night work, but inclusive of tropical differential and tax factor differential for all employees entitled thereto with the following provisos: night differential pay and pay for other additional pay assignments in the. . . Wage Board Groups of the Special Category shall be basic compensation for the purposes of computing . . . retirement deductions . . . .

Pay Administration Issuance 514, Special Evaluation Plans.

Sect.1 The Special Evaluation Plans embrace those administrative and wage board occupational groupings which have been excepted from the Non-Manual . . . and Manual . . . categories and which have been specifically included in Sections two (2) and three (3) of this issuance.

* * *

Sect 2(e) . . . , Panama Canal Pilots . . . .

* * *

STATEMENT OF THE CASE

Petitioner is a Panama Canal pilot, employed by the Panama Canal Commission, an agency of the United States Government. The Panama Canal Commission is an independent agency which sets the pay scales of its employees and is an agency which can sue and be sued in its own name. Petitioner is covered by the Civil Service Retirement System.

The amount paid into the Civil Service Retirement Fund by agencies and employees is determined by the basic pay of the employee. The central issue of this dispute is the calculation of petitioner's basic pay and the determination of the amounts due periodically to the Civil Service Retirement Fund. The case turns on the definition of the word "bonus" as that word is used in 5 U.S.C. §8331(3). This statute excludes bonuses from calculation of basic pay and a large portion of petitioner's pay has been denominated as "bonus pay" by the Panama Canal Commission. Petitioner claims that it is the nature of a particular payment, and not its label, which determines whether or not it is included in base pay. To date, the Government has been successful in relying upon its designation of the pay in question as "bonus pay" to keep this remuneration out of the calculation of basic pay. See Appendix pp. 15a and 17a.

Petitioner is paid on a piece work basis with a guaranteed minimum. At the time this case was initiated, Panama Canal pilots were paid a base salary plus payments depending upon the number of assignments during a two week pay period. During the

period covered by this suit, petitioner worked under both the regular plan and the six-four alternate work plan. At the time this case was initiated, a regular plan pilot earned his base pay whether working, on leave, or standing by for an assignment. He began to earn "bonus" pay with his third assignment during the two week pay period. In other words, a regular plan pilot doing a normal workload of three assignments per week would be paid "bonus" pay for the last four of his six normal assignments in two each week pay period. Assuming an average of 13 hours per assignment, this "first forty hour" employee would be earning all of his "bonuses" for doing his regular work in the regular course of a forty hour week.

On 7 January 1992 petitioner requested that the Panama Canal Commission compute his retirement contributions using at least that part of his assignment pay which was earned during the course of a normal work week. On 31 January 1992 the agency refused petitioner's request citing the "bonus" prohibition of 5 U.S.C. §8331(3). On 10 July 1992, petitioner sought the aid of the Office of Personnel Management. No response to that letter was ever received, and on 19 May 1993 suit was filed in the Eastern District of Louisiana naming the Panama Canal Commission and its Administrator as defendants. An order in the nature of mandamus was sought compelling defendants to properly compute retirement contributions. Defendants moved for dismissal claiming that the court lacked jurisdiction and that exclusive jurisdiction lay in the Office of Personnel Management. The court acknowledged

its jurisdiction but deferred to OPM as a matter of discretion. Judgment for defendants was entered on 14 October 1993. An appeal to the Fifth Circuit Court of Appeals resulted in an affirmance on 19 May 1994.

On 26 May 1994, petitioner returned to OPM. After a large amount of strange correspondence, petitioner's claim was denied on 10 January 1995. An appeal was made to the Merit Systems Protection Board and acknowledged on 9 February 1995. An adverse decision was rendered on 11 October 1995.

On 17 November 1995 the United States Court of Appeals for the Federal Circuit docketed petitioner's appeal. Jurisdiction lay in the Federal Circuit under 28 U.S.C. §1295 (a) (9). That court rendered judgment for the OPM on 8 March 1996 and denied the petition for rehearing on 17 April 1996.

At no time in the history of this case has any court or administrative authority analyzed the nature of pilot assignment pay.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Due process requires something more than crossing off the items on an appeals check list. In support of this case the petitioner has submitted federal and state case law on the nature of bonus payments, including one federal district court case on all fours with the instant case. Petitioner has also argued that the

definitions of bonuses found in other federal statutes should be given weight, as should the generally accepted definition of the word as set out in WORDS AND PHRASES. Finally, petitioner submitted a Panama Area Wage Board Regulation indicating that pilot "bonus" pay should be included in the computation of basic pay.

The issue submitted to the Merit Systems Protection Board was:

> WHEN DETERMINING WHETHER COMPENSATION IS TO BE INCLUDED IN, OR EXCLUDED FROM, THE TOTAL ON WHICH CIVIL SERVICE RETIREMENT FUND CONTRIBUTIONS ARE COMPUTED, MUST THAT DETERMINATION BE BASED ON THE NATURE OF THE COMPENSATION IN QUESTION, OR MAY AN AGENCY BASE ITS DETERMINATION SOLELY ON THE LABEL THAT IT HAS APPLIED TO THAT ITEM OF COMPENSATION?

The Government attended neither the pre-hearing conference nor the hearing. Its only record response can be summarized as: When we use a word, it means exactly what we want it to mean; neither more, nor less!

The Administrative Law Judge did not directly dis-

cuss the legal issue submitted by petitioner. Instead, he found:

1. 5 U.S.C. §8331(3) precludes consideration of bonuses when calculating basic pay.

Note: The issue was whether or not the pay in question is a bonus.

2. The pay in question was a bonus because the employee could avoid earning it by going on leave.

Note: Any government employee with leave on the books can go on leave without losing base pay. This hardly proves that everything earned after one day's work per week is a true bonus.

3. Bonus definitions from other federal statutes are immaterial.

Note: Bonus definitions from the Federal Employees' compensation Act and the Fair Labor Standards Act are consistent with case law definitions and should have been given weight as persuasive authority.

4. No authority was submitted to support the contention that the Fair Labor Standards Act was applicable to the case.

Note: Prior to 1979 the Fair Labor Standards Act was applicable in the Canal Zone. When the Canal Zone ceased to exist, the words "Canal Zone" were removed from the statute. Petitioner had argued that

the Act should apply to the Panama Canal Commission as a Government agency, and that, even if the Act were determined not to be applicable, its definition of "bonus" should be accepted as applicable by analogy.

5. No evidence was submitted to show that Panama Area Wage Board Issuance 550 was applicable.

Note: The issuance provides that for certain employees, the sort of pay involved in this case is to be considered basic pay. Through inadvertence, Wage Board Issuance 514 was not cited by number. This is the Issuance which places Canal Pilots in the "special category" mentioned in 550. The failure to cite the Issuance should not have been fatal. Petitioner had stated that pilots were in this category and no denial had been made by the agency. There was, in fact a citation to the Issuance buried in the record in an exhibit. This fact was called to the attention of the Board on a petition for rehearing, but was ignored.

Petitioner's rather voluminous authority has been disregarded. The government has submitted no authority other than the wording of the statute itself. There is no doubt what the statute says; the issue is what is meant by the word "bonus". On this subject, the Government has submitted no authority and, without participating in the hearing process, has prevailed. If petitioner has not been denied due process, at least

that appearance is present. If the OPM, MSPB, and the Federal Circuit Court of Appeals are not acting as rubber stamps for an agency, that is the appearance that is given. If Federal employees are to have faith in the Government and in the appeals process, such appearances must be avoided.

Supervision of The Federal Judiciary. The integrity of the appeals system and the independence of the U.S. Court of Appeals for the Federal Circuit can be insured only through supervision by this Court. The writ of *certiorari* should issue.

PETITIONER'S AUTHORITY

5 U.S.C. §8331(3) provides that bonuses should not be used in computing basic pay, but does not define "bonus". WORDS AND PHRASES has several pages of entries under the heading of "BONUS". The central theme of those entries is that a bonus is an extra payment, given for services which are in excess of that which would ordinarily be given. In the instant case we have a payment which is called a bonus, but which is given for performing one's normal work in the course of a normal work week. This payment is not a bonus.

In *Burns* v. *U.S. Postal Service,* 380 F.Supp. 623 (S.D.N.Y.) (1974), the court considered the exact issue involved in the instant case. The U.S. Postal Service had given a raise to nonsupervisory employees and, in response to complaints from supervisors, devised a "bonus" scheme to increase supervisors' pay. The bonuses were not supposed to be used in calculating basic pay

for retirement purposes. The court said that it was the nature of the pay and not its label which determined what was or was not basic pay. Wisely, the Government did not appeal and there is no appellate court authority on the issue in the federal courts. There is authority in State courts. A case on all fours is *Sanders* v. *United Distributors, Inc.*, 405 So.2d 536 (La.App. 1981).

This Court has considered the nature of bonus payments many times in connection with determination of the "regular rate" as set forth in the Fair Labor Standards Act. 29 U.S.C. §§201-219:

> Piece work wages do not escape the force of Section 7(a) merely because they are paid in addition to a minimum hourly pay guaranteed by contract. Indeed, from another viewpoint, the incentive employees so compensated are in fact paid entirely on a piece work basis with a minimum hourly guaranty. The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of [the Statute]. We cannot sanction such a patent disregard of statutory duties. *Walling* v. *Harnischfeger Corporation,* 325 U.S. 427, 431 (1945)

This is the case at bar. Pilots are paid on a piecework basis with a minimum guaranteed wage. The Court went on to say, at page 432:

> In this instance, 98.5% of the incentive employees receive incentive bonuses in addition to their guaranteed hourly wages, demonstrating that such bonuses are a normal and regular part of their income. Once the parties agree that these employees should receive such piece work wages, those wages automatically enter into the compensation of the regular rate for purposes of [the statute] regardless of any contract provision to the contrary.

29 CFR 778.211(b) covers this area today

The words "regular rate" are not defined in the Fair Labor Standards Act. In spite of this oversight on the part of the Congress, this Court had no trouble in figuring out what was meant and in rejecting attempts to evade the law with bonuses.

> While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. *Walling* v. *Helmerisch & Payne, Inc.*, 323 U.S. 37, 40 (1944).

That case, heard on a writ of *certiorari* to the Tenth Circuit, is our case exactly. Basic pay is the pay actually paid for the normal, non-overtime workweek. At one point in the history of this case, the Government

brought up the fact that the pilots' union had signed an agreement stating that "bonuses" were not base pay. The Administrative Law Judge considered this fact in spite of the circumstances surrounding the agreement and the fact that it was signed long after this case was commenced. This Court has had occasion to consider such agreements in the past:

> The regular rate is an "actual fact" and in testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do. *149 Madison Avenue Corporation* v. *Asselta, et al.*, 331 U.S. 199, 204 (1947).

In the instant case, not only has no one looked beyond the parties' purported acts, no one has looked beyond the label of "bonus" which has been fixed, maintained, and staunchly defended by the Panama Canal Commission.

5 U.S.C. §8114 covers computation of pay for determining injury compensation payments. Like the retirement statute, this section excludes bonus payments from the computation. Unlike the retirement statute, the compensation statute is fairly clear on what is or is not a bonus. §8114(e) (3) excludes "bonus or premium pay for extraordinary service." The theory behind bonus exclusion is the same whether we are dealing with the compensation statute, the FLSA, or the retirement statute; i.e., extraordinary payments should

be removed before determining a person's actual salary. As shown by the exhibits before the OPM, MSPB, and Federal Circuit Court of Appeals, the agency has been consistent. In spite of the rather clear language of the compensation statute, the Canal Commission refused to include pilot "bonuses" in the computation of an injured pilot's compensation. Such inclusion began only after the agency was instructed by the Department of Labor to include pilot "bonuses."

Pay rates for employees of U.S. Government agencies in the Republic of Panama are set forth in regulations issued by the Panama Area Wage Board. Issuance 550 states that "night differential and pay for other additional pay assignments in the . . . Wage Board Groups of the Special Category shall be basic compensation for the purposes of computing . . . retirement deductions . . . ." Wage Board Issuance 514 states, in section 2(e), that Panama Canal pilots are Special Category employees.

This information has been before the decision makers at all levels of this case.

Gross Miscarriage of Justice and Subtle Erosion of the Law. This Court has made a clear pronouncement on the subject of bonuses as they relate to the "regular rate." This principle is equally applicable to the subject of base pay, whether in determining injury compensation or retirement contributions. The decision makers in this case have ignored that principle and petitioner has suffered a gross miscarriage of justice as a result. If administrative agencies and the Federal

judiciary are allowed to ignore this principle of law and bury their handiwork in unpublished opinions, the principle will soon be more honored in breach than observance; only an empty shell will occupy the space where this Court's "regular rate" cases now stand.

CONCLUSION AND PRAYER

Everything necessary to decide this case in petitioner's favor is contained within the record. The whole case turns on a single issue of law:

> DOES THE WORD "BONUS" AS USED IN §8331 OF TITLE 5, UNITED STATES CODE, HAVE A UNIQUE MEANING WHICH IS DIFFERENT FROM ITS MEANING ELSEWHERE IN STATUTORY AND CASE LAW?

If the answer to that question is no; if the word "bonus" in 5 U.S.C. §8331 does not have a meaning unique to that statute, then petitioner must prevail. It is submitted that the meaning is not unique. Petitioner prays reversal of the decision below and entry of judgment in his favor without further proceedings of any sort. Alternatively, it is prayed that a writ of *certiorari* issue.

Respectfully submitted,

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Petitioner, Pro Se

26 June 1996

APPENDIX A

NOTE: Pursuant to FedCir R47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

96-3043

JAMES R. DUNWORTH,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGMENT,

Respondent.

DECIDED: March 8, 1996

Before RICH, MAYER, and SCHALL,
Circuit Judges.
PER CURIAM

JAMES R. Dunworth, a Panama Canal pilot employed by the Panama Canal Commission, appeals an initial decision of the Merit Systems Protection Board, No. DC0831950327 -I-1 (June 5, 1995), affirming the decision of the Office of Personnel Management on reconsideration. The Office of Personnel Management affirmed its earlier decision deny-

ing Dunworth's request that Civil Service Retirement System deductions be withheld from the bonus portion of his total pay. The board's initial decision became final on October 11, 1995, when the full board denied his petition for review. We *affirm*.

We review the board's decisions under a narrow standard. We must affirm a decision of the board unless it is demonstrated to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. §7703(c) (1994).

Under the relevant statute, "basic pay" for purposes of the Civil Service Retirement System does not include "bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation except as provided by subparagraphs (B), (C), (D), and (E) of this paragraph . . . ." 5 U.S.C. §8331(3) (1994)

Dunworth essentially argues that because "bonus pay" comprises a sizeable portion of his income, and because he regularly receives such bonuses, their true nature is that of basic pay." We disagree. The considerations upon which Dunworth focuses his argument are not a part of the statutory scheme. Section 8331 makes clear that bonus pay is not included in the computation of an employee's basic pay for purposes of determining his contribution to the Civil Service Retirement and Disability Fund, and thus that they should not be included in the computation of basic pay for the purpose of withholding retirement contributions. We see no error in the board's treatment of this issue.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JAMES R. DUNWORTH,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency

(C942200011)

DC - 0831 - 95
0327-I-1

JUN 5, 1995

JAMES R. DUNWORTH, Republic of Panama, Pro se.

CONNIE E. TORRILLO, Washington, D.C.,
for the agency.

BEFORE

EDWARD F. MANNING,
Administrative Judge

INITIAL DECISION

The appellant timely appealed an Office of Personnel Management (OPM) January 10, 1995 reconsideration decision which affirmed an earlier OPM initial decision that denied appellant's request that Civil Service Retirement System (CSRS) deductions be withheld from the bonus portion of his total pay. Appeal File (AF), Tab 1. The Board has jurisdiction over appeals from OPM reconsideration decisions. *See* 5 USC §8347 (d); 5 CFR §831.110. For the following reasons, the agency's reconsideration decision is AFFIRMED.

BACKGROUND

The appellant is a Panama Canal pilot employed by the Panama Canal Commission (PCC). AF, Tab 1. In a May 26, 1994 initial submission to OPM, the appellant requested that it instruct his employer, the PCC, to include that portion of his pay that he referred to as "bonus" pay, in the basic pay amount used to determine the amount of CSRS retirement deductions to be withheld. *Id.* at Tab 3, Subtab 5. In its response, OPM stated that, by statute, a bonus was not to be included in the computation of an employee's basic pay, from which a percentage is withheld that represents the employee's contribution to the CSRS retirement fund. *Id.* at Subtab 4. It further stated that it did not have the discretion or authority to either waive or alter this provision of law. *Id.* This initial OPM decision was affirmed in a reconsideration decision, which the appellant has challenged in the instant appeal. AF, Tab 1.

A telephone hearing was conducted on April 26, 1995.

ANALYSIS

The appellant bears the burden of proving by preponderant evidence that he is entitled to the retirement annuity relief he is seeking. *See* 5 CFR §1201.56 (a) (2); *Portacio v. OPM,* 52 MSPR 396, 399 (1992). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue *See* 5 CFR §1201.56 (c) (2).

An employing agency is required by law to "deduct and withhold 7 percent of the basic pay of an employee," and to deposit that amount in the Treasury of the United States to the credit of the Civil Service Retirement and Disability Fund. *See* 5 USC §8334 (a); 5 CFR §831.111. It is also required to deposit a like amount from its annual appropriation or fund used to pay the employee, as a contribution to the Fund. *Id.* The law specifically defines "basic pay," and states that it is not to include "bonuses." *See* 5 USC §8331 (3).

The determination of the amount of basic pay from which retirement deductions are made is important because, for our purposes here, basic pay serves as a base for determining "average pay," which is a factor used in computing an employee's annuity at retirement. *Id.* at §§8331 (3), (4), 8339 (a).

The appellant stated that his pay is based on a "six-four plan" which requires senior pilots to work six weeks on, with four weeks off. AF, Tab 6 at 3. During his six week work periods he earned his annual base pay salary of approximately $86,000,[1] "by being available to perform a minimum of three assignments

during each 2-week period." *Id.* at 3-4. Bonus payments, for completing additional assignments, usually provided the appellant with approximately $30,000 of additional income. Hearing Tape 1, Side A. Additional amounts could be earned for overtime and holiday work, and a night differential was also paid. *Id.*

The appellant conceded that once the minimum requirement noted above was met a pilot could use sick leave to avoid taking any additional assignments, and that in order to promote efficiency, i.e., to insure that pilots were available when they were needed, the PCC paid a bonus for all assignments accepted in excess of the minimum. *Id.* He argues, however, that the completion of only three assignments during a two week period by a six-four pilot was not a normal workload, and that additional assignments, for which the "completion assignments bonuses" were paid should be considered in determining his normal workload. *Id.* He contends that the total pay he receives, to include completion assignment bonuses, should be considered his basic pay from which deductions are made for retirement annuity purposes. *Id.*

The appellant argued that OPM has ignored the nature of the pay he receives as a bonus and has incorrectly determined that it does not qualify for retirement deductions because of its label. Hearing Tape 1, Side A. To support his argument he cited to the fact that bonus payment is included as part of the monthly

[1]*Appellant noted that, while not relevant to this claim, his base pay increased in December 1994 to approximately $107,000, with a bonus available, if he accepts all assignments offered during his work period, of an additional $35,000 to $40,000. Hearing Tape 1, Side A.*

pay figure that is used in determining the compensation payable from the Employees' Compensation Fund to a pilot injured while in the performance of his duty. *See* 5 USC §8114 (e) (3); AF, Tab 1, Subtab 11-2.

The law governing the Employee Compensation Fund does not control the definition of basic pay for purposes of the Civil Service Retirement and Disability Fund. *See* 5 USC §§8331-8351. In particular, I note that in regard to the former, the only bonus payments excluded in determining the monthly pay of an injured employee are those for "extraordinary service including bonuses or pay for particularly hazardous service in time of war." *See* 5 USC § 8114 (e) (3). While the completion assignment bonuses paid to the appellant may not meet this narrow definition, I do not find that fact determinative of whether such bonuses should be considered basic pay for retirement annuity purposes.

In regard to on-the-job injuries, the appellant has also proffered, as appellant's exhibit G, a PCC memorandum that states completion assignment bonuses are included for purposes of calculating continuation of pay (COP) benefits under 5 USC §8118, because to exclude them "would result in an interruption in the employees income within the meaning of the Federal Employees' Compensation Act." I note that the memorandum also states, in regard to continuation assignment bonuses, that they are to be considered for COP calculations only, and that it, the memorandum, did not establish or imply that the bonuses were to be considered basic pay for retirement purposes or any other purpose.

The appellant also argued that the definition of "regular rate" of employment to include "extra com-

pensation" as provided by the Fair Labor Standards addressed in 29 USC §§201-219 and the regulations found at 29 CFR Chapter V, is applicable to his appeal. Hearing Tape 1, Side A. He has, however, provided no authority to support this assertion, Accordingly, absent more I do not find this argument determinative of the issue of whether the canal pilot completion assignment bonuses the appellant receives should be considered a part of his basic pay for CSRS retirement deduction purposes. *See* 5 USC §§8331 (3), 8334 (a).

The appellant also contended that a document labeled Panama Area Wage Board Issuance 550 is pertinent to this appeal. AF, Tab 1, Subtab 11 at exhibit 3. Specifically, he asserts that Canal pilots are employees who are part of the "Wage Board Groups of the Special Category," and as such their basic compensation for purposes of retirement deductions includes "pay for other additional pay assignments." Hearing Tape 1, Side A. He has not supported this argument with other evidence of record, and the document itself does not define the terms listed above, nor specifically address canal pilots or continuation assignment bonuses.

Moreover, I do not find this issuance as controlling, in any event, the statutory definition of what constitutes basic pay as defined by 5 USC §8331 (3).

Turning to the appellant's employing agency, the PCC, I note that they have specifically rejected the appellant's contention that the continuation assignment bonuses he receives should be considered basic pay for retirement deduction purposes. AF, Tab 1, Subtab 2. In addition, in a February 24, 1995 letter to OPM, the personnel director of the PCC advised that pay matters were the subject of informal discussions

between PCC and the appellant's union in late 1994, that the parties agreed, in a memorandum of understanding, that bonus payments are not considered basic pay for the purposes of the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS). *Id.* at Tab 3, Subtab 6. He also noted that the bonus payment language was included in the memorandum without debate or discussion, and that the union had no reason to debate it because the provision merely confirmed a previously existing understanding that bonus pay is not a part of basic pay. *Id.*

The appelant challenged the above with an affidavit from Jorge Teran, another canal pilot, who stated that he disagreed with the PCC letter discussed above. AF, Tab 9. Specifically, he stated that during the negotiation of the memorandum of understanding that the union was advised by the PCC that wages were nonnegotiable, that the language dealing with bonuses and basic pay was part of the PCC pay offer for which there was no opportunity for negotiation, and that the union's acceptance of the pay system described in the memorandum was not meant to foreclose a review of the legal issue addressed by appellant. *Id.*

I do not find the descriptions of the circumstances surrounding the execution of the memorandum of understanding, as related by the PCC personnel director and by affiant Teran, to be necessarily inconsistent. Moreover, the PCC, as I have previously noted, does not consider the continuation assignment bonuses to be part of a canal pilot's basic pay, and whether the appellant's union agrees with this determination is not relevant to the issue of whether it is supported by law. AF, Tab 1, Subtab 2.

Based on the above, I conclude that the appellant's definition of what a normal workload is for a six-four pilot is not supported by evidence of record, nor has he shown that any law, regulation, or applicable agency policy statement supports his argument. To the contrary, as noted above, a six-four pilot, after he completes the required three assignments in a two week period, may utilize his sick leave to avoid further work without incurring any diminution of his basic pay or other penalty. Hearing Tape 1, Side A. It is the incentive provided by the continuation assignment bonuses that enables the agency to provide for pilots when they might otherwise be unavailable. *Id.* Consequently, I conclude that the continuation assignment bonuses are not basic pay as defined by 5 USC §8331 (3).

The appellant here has the burden of proof by a preponderance of the evidence with respect to his claim. *See* 5 CFR §1201.56 (a) (2); *Danganan v. OPM,* 55 MSPR 265, 268 (1992), *aff'd* 19 F. 3d 40 (Fed. Cir. 1994) (Table). He has failed to show either a statutory or regulatory right to the relief he seeks, and the record does not otherwise establish such a right, Thus, I conclude that he has not met this burden. *cf. Banks v. OPM,* 58 MSPR 19, 21 (1993) (basic pay does not include bonuses, allowances, or overtime pay).

DECISION

The agency's reconsideration decision is

Affirmed.

FOR THE BOARD: S/_____
Edward F. Manning
Administrative Judge

(Procedural Notices Omitted))

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DUNWORTH v. OPM, 96-3043

ORDER

Before RICH, Circuit Judge; MAYER, Circuit Judge; and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, DENIED.
The mandate of the court will issue on April 29, 1996 unless another time becomes appropriate under Rule 41.

FOR THE COURT,
FRANCIS X. GINDHART,
CLERK

April 17, 1996

By S/ _____
Brian P. LeDuc
Associate Chief Dep'y

File 4-17-96

Note: Pursuant to Fed. Cir. R.47.6, this order is not citable as precedent. It is a public record.

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES R. DUNWORTH,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(C942200011)

DC - 0831 - 95
0327-i-1

Oct. 11, 1995

JAMES R. DUNWORTH, Washington DC, Pro se.

CONNIE E. TORRILLO, Washington, D.C., for the agency.

BEFORE

BEN L. ERDREICH, *Chairman*
BETH S. SLAVET, *Vice Chair*
ANTONIO C. AMADOR, *Member*

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 5, 1995, because it does not meet the criteria for review set forth at 5 C.F.R. 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 CFR §1201.113 (b).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. §7703 (a) (1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 USC 7703 (b) (1).

FOR THE BOARD: S/_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX E

UNITED STATES COURT OF APPEALS

96-3043

JAMES R. DUNWORTH
Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT
Respondent.

JUDGMENT

ON APPEAL from the MSPB in CASE NO. DC0831950327-I-1
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

Dated MAR 08 1996 S/_____
Iss'd as Mandate 4/29 F.X. Gindhart, Clk

APPENDIX F

OFFICE OF PERSONNEL MANAGEMENT
Washington, D.C. 20415-0001
14 June 1994

J. R. Dunworth
PAC 0839 - P.O. Box 37301
Washington, D.C. 20013

Dear Mr. Dunworth:

Thank you for your letter to the Director, concerning your belief that Civil Service Retirement deductions should be withheld from the bonus portion of your Panama Canal Pilot pay. The Director referred your letter to this office for a proper review and response.

As you know, Section 8334 (a) (1) of Title 5, United States Code, requires that Federal agencies withhold a percent of an employee's basic pay for retirement purposes. Section 8331 (3) of Title 5, United States Code, specifically excludes *bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay as fixed by law or regulation, (and) . . . uniform allowances* from the definition of base pay. Consequently, **bonuses** should not be included in the computation of basic pay for the purpose of withholding

retirement contributions.

Since this is a matter of statute, the Office of Personnel Management does not have the discretion or authority to waive or alter these provisions of law. You may contact Mr. Walter Bottin, the agency designated *Retirement Counselor* for Panama Canal Commission employees, should you wish to obtain further information about your basic pay. You may also contact your United States Representative to determine if he or she would support an amendment to the law which defines basic pay for retirement purposes.

We hope the information is helpful.

Sincerely,

S/ _____
Richard J. Ikenberry
Advisory Services Office
Retirement Policy Development

APPENDIX G

OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415-0001
JAN 10 1995

CRR: TE C942200011

J. R. Dunworth
PAC 0839 - P.O. Box 37301
Washington, D.C. 20013

Dear Mr. Dunworth:

This is in reply to your December 2, 1994 request for reconsideration of the Office of Personnel Management's (OPM) letter dated June 14, 1994, concerning the withholding of retirement contributions from your bonus pay. For the reason stated below, we affirm the June 14, 1994 letter.

BACKGROUND

According to our records, you believe that Civil Service Retirement deductions should be withheld from the bonus portion of your Panama Canal pilot pay. OPM does not have the discretion or authority to waive or alter the provisions of law. Consequently, bonuses should not be included in the computation of basic pay for the purpose of withholding retirement contributions.

ANALYSIS AND FINDING

OPM is charged with the administration of the Civil Service Retirement law and is expected to pay benefits only as provided by law. Also, we are obligated under law and regulation to correct any error(s) in payment of benefits.

Section 8334 (a) (1) of title 5, United States Code, provides in pertinent part:

(a) (1) The employing agency shall deduct and withhold 7 percent of the basic pay of an employee...

Section 8331 (3) of title 5, United States Code provides in pertinent parts:

(3) "basic pay" includes-

(A) (Subparagraphs A through E deleted)

but does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base of a position as fixed by law or regulation except as provided in subparagraphs (B), (C), (D), and (E) of this paragraph . . . (Emphasis added.)

Again, since this is a matter of statute, OPM does not have the authority to waive or alter these provisions of law. Therefore, bonuses should not be included in the computation of basic pay for the purpose of withholding retirement contributions.

APPEAL RIGHTS

This constitutes the final decision of OPM on this matter. You have the right to appeal this decision to

the Merit Systems Protection Board (MSPB). The enclosed sheet provides filing instructions. Please note that you have 35 days from the date of this letter to file your appeal.

Sincerely,

S/ _____
Telita Estes,
Benefits Specialist
Reconsideration and
Appeals Division

Enclosure